BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of 17.24.101, 17.24.102, 17.24.103, 17.24.104, 17.24.106, 17.24.115, 17.24.116, 17.24.117, 17.24.118, 17.24.119, 17.24.140, 17.24.146, 17.24.167, and 17.24.184, pertaining to the Metal Mine Reclamation Act	NOTICE OF AMENDMENT (Metal Mine Reclamation)

TO: All Concerned Persons

1. On August 15, 2002, the Board of Environmental Review published a notice of public hearing on the proposed amendment, adoption and repeal of the above-stated rules at page 2059, 2002 Montana Administrative Register, issue number 15.

2. The Board has amended ARM 17.24.101, 17.24.103, 17.24.104, 17.24.106, 17.24.119, 17.24.146, 17.24.167 and 17.24.184 exactly as proposed. The Board has amended ARM 17.24.102, 17.24.115, 17.24.116, 17.24.117, 17.24.118 and 17.24.140 as proposed, but with the following changes: (deleted matter interlined, new matter underlined)

17.24.102 DEFINITIONS (1) through (12) remain as proposed.

(13) "Reclamation" means the return of lands disturbed by mining or mining-related activities to an approved postmining land use which has stability and utility comparable to that of the premining landscape except for rock faces and open pits which may not be feasible to reclaim to this standard. Those rock faces and open pits must be reclaimed in accordance with 82-4-336, MCA. The term "reclamation" does not mean restoring the landscape to its premining condition. Reclamation, where appropriate, may include, but is not limited to, neutralizing cyanide or other processing chemicals; closure activities for ore heaps, waste rock dumps, and tailing impoundments; closure activities for surface openings; grading, soiling and revegetating disturbed lands; removal of buildings and other structures that have no utility in regard to the approved post-mine land use; other steps necessary to assure long-term compliance with Title 75, chapters 2 and 5, MCA; and other steps necessary to protect public health and safety at closure.

(14) through (17) remain as proposed.

17.24.115 OPERATING PERMITS: RECLAMATION PLANS

(1) through (1)(m) remain as proposed.

(n) The plan must provide for post mine environmental monitoring programs and contingency plans for the post reclamation permit area. The monitoring programs and contingency plans must be related in scope and duration to the risk to public safety, water quality and adjacent lands they were designed to address.

17.24.116 OPERATING PERMIT: APPLICATION REQUIREMENTS

(1) and (2) remain as proposed.

(3) In addition to the information required by 82-4-335(4), MCA, an application for an operating permit must describe the following:

(a) through (t) remain as proposed.

(u) the protective measures ~~for off-site~~ designed to avoid foreseeable situations of unnecessary damage to flora and fauna in or adjacent to the area.

(4) and (5) remain as proposed.

17.24.117 OPERATING PERMIT CONDITIONS (1)(a)(i) through (1)(a)(iv) remain as proposed.

(v) plans or assumptions used in calculating bond amounts that have been posted by the permittee ~~the most recent reclamation bond calculations~~.

(b) and (c) remain as proposed.

17.24.118 OPERATING PERMIT ANNUAL REPORT (1) through (12) remain the same as proposed.

(13) The department shall, by certified mail, notify a permittee, who fails to file an annual report and fee as required by this rule, that the permit will be suspended if the report and fee are not filed within 30 days of receipt of the notice~~, unless a 30-day extension is granted by the department~~.

(14) remains as proposed.

17.24.140 BONDING: DETERMINATION OF BOND AMOUNT

(1) through (3) remain as proposed.

(4) Unless the provisions of the bond provide otherwise, ~~The~~ the line items in the bond calculations are estimates only and are not limits on spending of any part of the bond to complete any particular task subsequent to forfeiture of the bond or settlement in the context of bond forfeiture proceedings.

(5) and (6) remain as proposed.

3. The following comments were received, and appear with the Board's responses:

17.24.102 Definitions

COMMENT NO. 1: A number of commentors strongly opposed the proposed amendment to the definition of "collateral bond" set forth in ARM 17.24.102(5), indicating that the current definitional language is sufficient. The commentors indicated

that the proposed amendment mimics the existing statutory language in 82-4-338, MCA, and does not clarify what type of collateral bond may be acceptable to DEQ.

RESPONSE: The current definition of "collateral bond" set forth in ARM 17.24.102(5) limits the types of instruments that the Department may accept to cash bonds, negotiable bonds, certificates of deposit and irrevocable letters of credit. This limitation is not consistent with 82-4-338, MCA, which allows the Department to accept a "cash deposit, an assignment of a certificate of deposit, an irrevocable letter of credit, or other surety acceptable to the department" as an alternative to a surety bond. Thus, the amendment to ARM 17.24.102(5) makes the definition of "collateral bond" consistent with 82-4-338, MCA.

Surety bonds recently have become difficult to obtain, requiring operators to submit bond secured in some other fashion. The Board believes that the Department should have the discretion to accept other types of bonds. The only other type of bond that has been accepted by the Department to date that is not specifically listed in 82-4-338, MCA, or ARM 17.24.102(5) has been a real property bond.

COMMENT NO. 2: The proposed amendment to the definition of "plan of operations" set forth in ARM 17.24.102(11) states that it includes the reclamation plan. However, the statutory references treat the reclamation plan separately from the plan of operations.

RESPONSE: This comment is directed at a provision currently contained in ARM 17.24.102(11). The current language defines "plan of operation" to include the reclamation plan. The proposed rule amendment provides that a plan of operation also includes operating, monitoring and contingency plans. The change suggested by the commentor is outside the scope of this rulemaking proceeding.

COMMENT NO. 3: Defining reclamation in ARM 17.24.102(13) to include "removal of buildings and other structures" may be interpreted in such a manner that the release of reclamation bond is delayed.

RESPONSE: Whether or not the removal of buildings and other facilities is a required component of reclamation is dependent on the approved post-mine land use. The post-mine land use is determined during the permit application process and may be subsequently changed by amendment. Release of the reclamation bond may be delayed if an operator fails to remove buildings, or other facilities associated with its mining operation, that are not consistent with the approved post-mine land use. For example, the failure to remove a mill building, where the approved post-mine land use is wildlife habitat, may result in a delay of bond release, while failure to remove a mill building, that has subsequent use to store farm equipment, would not result in a delay of bond release if the approved post-mine land use was cropland.

The Board has added additional language that ties reclamation of buildings and other structures with the approved post-mine land use. The nexus between building and other structure removal and the approved post-mine land use is further addressed in the Board's amendment to ARM 17.24.115(1)(m). See Response to Comment No. 6.

17.24.115 Operating Permits: Reclamation Plans

COMMENT NO. 4: Striking the introductory phrase "to the extent reasonable and practicable" leaves ARM 17.24.115(1)(c) without any recognition of this important statutory mandate. Because the proposed amendment eliminates the implication that only two vegetative efforts are required, this deletion of the introductory phrase is not necessary to implement the reclamation requirement that a self-generating vegetative cover be established.

RESPONSE: Section 82-4-336(8), MCA, requires a reclamation plan to provide for the establishment of vegetative cover if appropriate for the approved post-mine land use. This statutory mandate is carried forward in the amendment to ARM 17.24.115(1)(c), by requiring a reclamation plan to address establishment of vegetative cover commensurate with the post-mine land use. Adding the phrase "to the extent reasonable and practicable" would weaken and possibly contravene the requirement that an operator establish revegetation, if any, sufficient to achieve the post-mine land use.

COMMENT NO. 5: Section 82-4-336, MCA, states that a reclamation plan should require vegetative cover "if appropriate to the future use of the land as specified in the reclamation plan." The statement of reasonable necessity, set forth in the Notice of Public Hearing on Proposed Amendment in regard to the proposed amendment to ARM 17.24.115(1)(c), fails to expressly acknowledge that vegetative cover is required "if appropriate".

RESPONSE: In the statement of reasonable necessity, the Board indicated that the amendment to ARM 17.24.115(1)(c) clarified that a reclamation plan must require the "establishment of vegetative cover and permanent landscaping pursuant to 82-4-336(8) . . . . " By referring to 82-4-336(8), MCA, the Board intended to incorporate the statutory requirement that vegetative cover be addressed in a reclamation plan only if revegetation is appropriate for the approved post-mine land use. The Board agrees with the commentor's overriding concern that revegetation, including whether a site is to be revegetated at all, is dependent upon the approved post-mine land use.

COMMENT NO. 6: The proposed amendment to ARM 17.24.115(1)(m), regarding the reclamation of buildings and other structures, should clearly state that, like other reclamation activities, building removal should be required as

appropriate to post-mine use. As proposed, the regulation is ambiguous.

RESPONSE: The first sentence of ARM 17.24.115(1)(m) states that "all facilities . . . must be reclaimed for the aproved post-mine land use" and the second sentence states that a reclamation plan must require the "removal of buildings and other structures . . . consistent with the post-mine land use." Additionally, in response to Comment No. 3, the Board has added language in its amendment of ARM 17.24.102(13), tying the reclamation of buildings and other structures with the approved post-mine land use. The Board believes that these provisions clearly state that the removal of buildings and other structures during reclamation is dependent upon the approved post-mine land use.

COMMENT NO. 7: The proposed amendment to ARM 17.24.115(1)(n) includes post-mine environmental monitoring and contingency plans as part of the reclamation plan. The statement of reasonable necessity set forth in the Notice of Public Hearing on Proposed Amendment states that ARM 17.24.115(1)(n) is being added to implement 82-4-336(10), MCA. However, the reference statute is a general provision that does not authorize a regulation that is open-ended and not confined as to scope or duration.

RESPONSE: Section 82-4-336(10), MCA, requires "sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands." The scope and duration of the post-mine monitoring and contingency plans must coincide with the scope and duration of the risk to public safety, water quality, and adjacent lands.

The Board agrees that the provision should be qualified and has added additional language tying the scope and duration of the monitoring and contingency plans to the risk to public safety, water quality, and adjacent lands that the plans are designed to address.

COMMENT NO. 8: There appears to be a definitional problem with the proposed amendment to ARM 17.24.115(1)(n) regarding monitoring and contingency plans. First, the definition of operating plan states that it means "the reclamation plan . . . plus the approved operating, monitoring and contingency plans required in an application for an operating permit." This amendment to (n) adds monitoring and contingency plans to the reclamation plan, which by definition is part of the operating plan. Are the monitoring and contingency plans required in the application the same or different than those required in the reclamation plan?

RESPONSE: An application consists of operating and reclamation plans as required by 82-4-335 and 82-4-336, MCA. Monitoring and contingency plans may be appropriate during operations and/or during and following reclamation and, thus, may be included in both the operating plan and the reclamation

plan. The appropriateness of monitoring and contingency plans is site specific and determined during the permitting process.

COMMENT NO. 9: We do not necessarily oppose the addition of ARM 17.24.115(1)(n) but are curious for what type of contingency DEQ expects the operator to plan. This language could mean anything and should probably be more specific.

RESPONSE: The contingency, if any, would be operation specific and would be identified during the application review process. For example, a mine handling process water through a pipe system may be required to develop a spill contingency.

17.24.116 Operating Permit: Application Requirements

COMMENT NO. 10: The proposed amendment to ARM 17.24.116(3)(u) requiring protective measures for off-site flora and fauna should have some relationship to the mine itself.

RESPONSE: The Board has modified the amendment to ARM 17.24.116(3)(u) to require protective measures for only the off-site flora and fauna that may foreseeably be damaged by the operation.

COMMENT NO. 11: The proposed amendment to ARM 17.24.117(1)(a)(i) is unnecessary in light of the proposed amendment to the definition of "plan of operations" set forth in ARM 17.24.102(11). The latter rule provision already includes a reference to the approved operating, reclamation, monitoring, and contingency plans. Thus, the proposed amendment to ARM 17.24.117(1)(a)(i) is superfluous and redundant.

RESPONSE: This section is intended to be comprehensive in informing a permittee of the conditions accompanying the issuance of the permit.

17.24.117 Operating Permit Conditions

COMMENT NO. 12: Reclamation bond calculations may be entirely unilateral, involving only the agency. This proposed rule would allow the Department to unilaterally amend the permit with no participation by the permittee. This rule accordingly conflicts with 82-4-337(3), MCA, which provides for amendment of the permit by the Department in only three situations after timely notice and opportunity for hearing.

RESPONSE: The commentor correctly states that the provisions of a permit are properly amended only under the provisions of 82-4-337(3), MCA. The amendment to ARM 17.24.117 is not meant to circumvent that statutory provision. Rather, the purpose of the amendment is to make a condition of the permit plans or assumptions used by the Department in calculating a bond to which the permittee has agreed. The Board has modified the amendment to ARM 17.24.117 to make a condition of the permit only the plans and assumptions used in calculating a bond that has been submitted by the permittee.

17.24.118 Operating Permit Annual Report

COMMENT NO. 13: Companies should not be allowed extra time to file the annual report. Annual reports provide valuable information to the public and they should be filed in a timely manner. There is no statutory authority for any additional extension.

RESPONSE: The Board agrees with the comment and has deleted the proposed extension that would have given an operator thirty additional days to file its annual report.

17.24.140 Bonding: Determination of Bond Amount

COMMENT NO. 14: The unavoidable implication of the proposed amendment to ARM 17.24.140(4), is that there can and will be no release of bond upon completion of discrete aspects of reclamation. This proposed amendment creates an uncertainty with respect to incremental bond release associated with completed reclamation.

RESPONSE: ARM 17.24.140(4) addresses spending of the bond by the Department, following bond forfeiture, and does not address the issue of bond release when reclamation or discrete portions of reclamation have been completed. The Board has added language to the amendment to clarify that its provisions are only applicable subsequent to a bond forfeiture.

COMMENT NO. 15: To the extent that ARM 17.24.140(4) purports to apply to existing bonds, it may violate the constitutional prohibition of statutes impairing the obligations of existing contracts.

RESPONSE: In determining whether a state law constitutes an unconstitutional impairment of a contract, the Montana Supreme Court applies a three-tiered analysis. The threshold inquiry is whether the state law operates as a substantial impairment of the contractual relationship, focusing on the reasonable expectations of the parties under the contract. If the answer to the threshold inquiry is no, no further inquiry is required. If the state law constitutes a substantial impairment, two criteria must be satisfied in order for the state law to be upheld. The State, in justification, must have a significant and legitimate public purpose behind the state law. Once a legitimate public purpose has been identified, the adjustment of the rights of the contracting parties must be based upon reasonable conditions and be of a character appropriate to the public purpose behind the state law.

To satisfy bonding requirements, an operator must submit to the Department a bonding instrument in an amount determined by the Department to cover the cost of reclamation. Bonding instruments (whether a cash bond, surety bond, certificate of deposit assignment or letter of credit) contractually obligate the operator, or bonding entity on behalf of the operator, to

pay a sum not to exceed the bond amount determined by the Department in the event that the conditions for bond forfeiture are met. Unless provisions have been negotiated to the contrary and as a general rule, bonding instruments do not reference or incorporate the line-item estimates used in the bond calculation. Thus, the operator or the bonding entity does not have a contractual expectation that a line-item estimate in the bond calculation for a particular reclamation activity will serve as a limit on the amount of bond proceeds that the Department may spend on that reclamation activity. Thus, the proposed amendment is not a substantial impairment of the contractual relationship and does not violate the constitutional prohibition on the impairment of contracts.

The amendment to ARM 17.24.140(4) has been modified to take into consideration the exception to the general rule by adding the phrase "unless the provisions of the bond otherwise."

17.24.146 Bonding: Letters of Credit

COMMENT NO. 16: This language may be ambiguous for a surety and may deny an operator the ability to retain a letter of credit. The word "provision" could be changed to "provisions" to better clarify that the noncompliance resulting in forfeiture would be severe.

RESPONSE: The proposed amendment allows a letter of credit to be payable to the Department only under those circumstances that the Metal Mine Reclamation Act provides for forfeiture of the bond. These circumstances are set forth in 82-4-338(8)(a), 82-4-241(4), and 82-4-362(2), MCA. Thus, the proposed amendment addresses the commentor's concern that the forfeiture be allowed only when a "noncompliance" is severe by allowing collection on the letter of credit only under those circumstances that the Montana Legislature has deemed sufficiently severe so as to enact a statutory basis for bond revocation. The Department proposed inclusion of this provision in two letters of credit that were recently executed and did not receive any opposition from the issuing bank.

HB521 Review

COMMENT NO. 17: A House Bill 521 (HB521) review is not required for rules implemented under the Metal Mine Reclamation Act. A HB521 review is required, however, for rules implemented under Title 75, chapters 2 and 5 (Air Quality Act and Water Quality Act, respectively). Because ARM 17.24.102(13), 17.24.104, 17.24.106, 17.24.115 and 17.24.140 require compliance with Title 75, chapters 2 and 5, a HB521 review is required for these rule amendments.

RESPONSE: HB521 was enacted by the 1995 Legislature. See Chapter 471, Laws of 1995. A HB521 review requires the Department to make certain written findings if a proposed rule contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

As acknowledged by the commentor, HB521 is not applicable to the Metal Mine Reclamation Act. While these rule amendments require compliance with Air and Water Quality Act standards and requirements, the Air and Water Quality Act standards and requirements have already undergone a HB521 review when they were implemented. Therefore, no HB521 analysis is necessary. Furthermore, operators are bound to comply with the Air and Water Quality Acts.

BOARD OF ENVIRONMENTAL REVIEW

By: _____
JOSEPH W. RUSSELL, M.P.H.
Chairman

Reviewed by:

_____
JOHN F. NORTH, Rule Reviewer

Certified to the Secretary of State, _____, 2002.